



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,373	03/09/2004	Alain Leas	88265-74701	4476

28765 7590 12/07/2005

WINSTON & STRAWN LLP
1700 K STREET, N.W.
WASHINGTON, DC 20006

EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
----------	--------------

1761

DATE MAILED: 12/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/797,373

Applicant(s)

LEAS ET AL.

Examiner

Robert Madsen

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on October 21, 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10 and 25-33 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-10, 25-33 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 3/9/04.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____.

DETAILED ACTION

1. The Amendment filed October 21, 2005 in response to the Restriction Requirement has been entered. Claims 1-9,19-27 remain pending and are drawn to a single invention.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claim 31 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The specification does not describe how a chocolate shell containing inclusions, such as nuts, chips, or biscuits crumbles is *smooth*. One would assume that inclusions result in a surface with raised portions, which would not be smooth. For examination purposes, it will be assumed that somehow, even with inclusions, the outer surface is smooth.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-4,8-10,25,26,28,30,32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 623324 B1) in view of Kuehl et al. (US EP 0848910 A2).

6. Regarding claims 1-4,8-10,25,26,28,30,32, Luigi Grigoli et al. (Grigoli et al.) teach a molded chocolate conical shell of varying circumferences, as recited in claims 8,25,26 filled with ice cream as recited in claim 30, packaged in a sleeve longer than the ice cream and shell, as recited in claim 32, to protect the shell as recited in claim 1 (Column 2, lines 18-61, figures). The surface of the cone appears to be smooth (i.e. no raised portions are visible in the figures) as recited in claim 1, the shell has a consistent and even wall thickness (See Figures) as recited in claim 3, and decoration is provided on top of the ice cream (Column 2, lines 56-61), but Grigoli et al. is silent in teaching the chocolate cone includes a decoration in a pattern design comprising a first layer of strings made of a semi-solid confection and a second confection of a contrasting color as recited in claims 1,9,10 and 28, wherein the strings are flattened or pressed as recited in claim 2, the shell has a shiny appearance as recited in claim 3, and the pattern is maintained after removal of the package as recited in claim 4.

7. Kuehl et al. also teach molded chocolate shells intended for holding ice cream, but Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g. white and

Art Unit: 1761

plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the method followed is the same as Applicant's method.

Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify Grigoli et al. and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain chocolate is applied that is shiny as recited in claims 1-3, 9, 10 and 28, that maintains good definition as recited in claim 4, since Grigoli et al. teach decoration is desirable (i.e. by providing decoration at least to the top of the ice cream) and Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color), as recited in claims 1, 2, 9, 10, and 28, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3.

8. Claims 5-7, 29, 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 623324 B1) in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-4, 8-10, 25, 26, 28, 30, 32 above, further in view of Damato (EP 276333).

Art Unit: 1761

9. Luigi Grigoli et al. (Grigoli et al.) teach packaging the ice cream filled in a cone in a smooth appearing paper sleeve with a lid (See Figures and column 2, lines 56-61), but is silent in teaching the cone shaped sleeve is transparent as recited in claims 5-7, made of smooth clear plastic foil as recited in claim 29, and includes printed material or other adornments on the sleeve or lid as recited in claim 33.

10. Damato teaches a transparent plastic foil sleeve from an ice cream filled cone that not only provides a package, which appears to be smooth, that allows the ice cream and cone to be visible to the consumer , but further provides a liquid-tight package for good protection during sale and eating with improved handling due to an intended break line(See EPO and Derwent abstracts) Damato further teaches advertising on the sleeve (Figure 3). Therefore, it would have been obvious to modify Grigoli et al. and utilize a transparent plastic smooth foil sleeve as recited in claims 5-7,29, such as the one taught by Damato, since Damato teaches a smooth clear sleeve that not only allows the ice cream and cone to be visible to the consumer but provides the further benefit of a liquid-tight package for good protection during sale and eating with improved handling due to an intended break line. It would have bee further obvious to provide printed material on the sleeve, as recited in claim 33, depending on the intended use of the package of Grigoli et al. (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice cream filled cone includes printed material to identify the package.

Art Unit: 1761

11. Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 623324 B1) in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-4,8-10,25,26,28,30,32 above, further in view of Tanaka et al. (JP2000-118590).

12. Luigi Grigoli et al. (Grigoli et al.) teach packaging the ice cream filled in a cone in a paper sleeve with a lid (See Figures and column 2, lines 56-61), but is silent in teaching the ice cream extends over the cone and contacts the sleeve as recited in claim 27.

13. Tanaka et al. also teach ice cream in cones of a similar shape in paper packages (See Abstract and Figure 3). Tanaka et al. teach that in the prior art one eats ice cream either from a cup with a spoon or from a cone. However, Tanaka et al. teach a cone package design that offers the advantage of consuming the upper portion of the cone via spoon and then consuming the lower portion as a conventional ice cream cone wherein the upper portion includes ice cream that is above the cone and in contact with the package as recited in claim 27 (Abstract, paragraph 1-14, figures 2 and 5 in light of figure 3). Therefore, it would have been obvious to further modify Grigoli et al. and include ice cream that is above the cone and in contact with the package since this Tanaka et al. teach this offers the benefit of allowing the consumer to eat the first portion via a spoon and the remaining portion as a conventional cone.

Art Unit: 1761

14. Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 623324 B1) in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-4,8-10,25,26,28,30,32 above, further in view of Selbak (US 5425527).

15. Luigi Grigoli et al. (Grigoli et al.) teach inclusions, such as nuts, on top of the ice cream, but is silent in teaching the cone contains such inclusions (Column 2, lines 56-61). Selbak teaches inclusions are provided in ice cream cones as required by recipes (Abstract, Column 5, lines 48-67). Therefore, it would have been obvious to further modify Grigoli et al. and provide inclusions in the chocolate cone, depending on the particular chocolate recipe (e.g. chocolate with nuts) desired, since Grigoli et al. teach inclusions are desired as toppings on the ice cream, Selbak teaches ice cream cones may include inclusions depending on the particular recipe of the ice cream cone, and chocolate recipes have been known to include nuts.

Double Patenting

16. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to

Art Unit: 1761

be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

17. Claims 1-4,8-10,25-28,30,32 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,6,16,17,20 of copending Application No. 10/294,764 in view of Kuehl et al. (US EP 0848910 A2).

18. '794 claims a cone fat-based shell with a ice confectionery that extends beyond the shell having a decorative topping in a packaged sealed with a lid as recited in claims 1,25-28,and 32, but does not claim the cone is chocolate and cone includes the decoration in a pattern design comprising lines formed of a first layer of strings with second layer of a contrasting color as recited in claims 1,8-10 and 28, wherein the strings are pressed/flattened as recited in claim 2, the shell has a shiny in appearance as recited in claim 3, the pattern is maintained after removal of the package as recited in claim 4, and the ice confectionery is ice cream or sorbet as recited in claims 10 and 30.

19. Kuehl et al. also teach shells intended for holding ice confectioneries, such as ice cream or sorbet, and Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g. white and plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the method followed is the same as Applicant's method.

Art Unit: 1761

Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify '764 and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain chocolate is applied that is shiny as recited in claims 1-3, 9, 10 and 28, that maintains good definition as recited in claim 4, since Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color), as recited in claims 1, 2, 9, 10, and 28, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3. This is a provisional obviousness-type double patenting rejection.

20. Claims 5-7, 29, 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3, 6, 16, 17, 20 of copending Application No. 10/294,764 in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-4, 8-10, 25-28, 30, 32 above, further in view of Damato (EP 276333).

21. '764 does not claim the cone shaped sleeve is transparent as recited in claims 5-7, made of smooth clear plastic foil as recited in claim 29, and includes printed material

Art Unit: 1761

or other adornments on the sleeve or lid as recited in claim 33. Damato teaches a transparent plastic foil sleeve from an ice confection filled cone that not only provides a package, which appears to be smooth, that allows the ice cream and cone to be visible to the consumer, but further provides a liquid-tight package for good protection during sale and eating with improved handling due to an intended break line (See EPO and Derwent abstracts) Damato further teaches advertising on the sleeve (Figure 3).

Therefore, it would have been obvious to modify '764 and utilize a transparent plastic smooth foil sleeve as recited in claims 5-7,29, such as the one taught by Damato, since Damato teaches a smooth clear sleeve that not only allows the ice confection and cone to be visible to the consumer but provides the further benefit of a liquid-tight package for good protection during sale and eating with improved handling due to an intended break line. It would have been further obvious to provide printed material on the sleeve, as recited in claim 33, depending on the intended use of the package of '764 (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice confection filled cone includes printed material to identify the package. This is a provisional obviousness-type double patenting rejection.

22. Claim 31 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,6,16,17,20 of copending Application No. 10/294,764 in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-4,8-10,25-28,30,32 above, further in view of Selbak (US 5425527).

Art Unit: 1761

23. '764 does not claim the cone contains inclusions. Selbak teaches inclusions are provided in ice confection cones as required by recipes (Abstract, Column 5, lines 48-67). Therefore, it would have been obvious to further modify '764 and provide inclusions in the cone, depending on the particular recipe desired, since Selbak teaches ice confection cones may include inclusions depending on the particular recipe of the ice confection cone. This is a provisional obviousness-type double patenting rejection.

24. Claims 1-10, 25-33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-9, 19-33 of copending Application No. 10/385,177 in view of Kuehl et al. (US EP 0848910 A2).

25. '177 differs from the present invention only in that '177 does not claim the line pattern is formed by strings that are pressed/flattened, as recited in claims 1 and 2.

26. Kuehl et al. also teach molded chocolate shells intended for holding ice cream including line patterns with contrasting colors. Kuehl et al. teach forming the pattern lines by providing a first layer of strings and a second layer of a different color (e.g. first white and second plain chocolate) for the most interesting visual effects. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify '177 and include a pattern line decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain, since Kuehl et al. teach a pattern decoration for chocolate shells

Art Unit: 1761

that provides an attractive appearance with most interesting visual effects is formed with a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color). This is a provisional obviousness-type double patenting rejection.

27. Claims 1-10,25-31 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5,10-14 of copending Application No. 10/800,222 in view of Kuehl et al. (US EP 0848910 A2).

28. '222 claims a cone shaped fat-based shell comprising chocolate chip inclusions and containing ice cream that extends beyond the shell in a transparent plastic foil packaged as recited in claims 1,5-8,10,25-27,29-31, but does not claim the cone includes the decoration in a pattern design comprising strings/lines of a first confection layer that are pressed/flattened to form a smooth surface and a second contrasting color confection layer as recited in claims 1,2,8-10 and 28, that is shiny in appearance as recited in claim 3, that the pattern is maintained after removal of the package as recited in claim 4.

29. Kuehl et al. also teach shells intended for holding ice cream, and Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g. white and plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the

Art Unit: 1761

method followed is the same as Applicant's method. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify '222 and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain chocolate is applied that is shiny as recited in claims 1-3,9, 10 and 28, that maintains good definition as recited in claim 4, since Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color), as recited in claims 1,2,9,10, and 28, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3. This is a provisional obviousness-type double patenting rejection.

30. Claims 32 and 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-5,10-14 of copending Application No. 10/800,222 in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-10,25-31 above, further in view of Damato (EP 276333).

31. '222 does not claim the cone shaped sleeve includes a lid as recited in claim 32 or printed material or other adornments on the sleeve or lid as recited in claim 33.

Art Unit: 1761

Damato teaches a transparent plastic foil sleeve from an ice confection filled cone that advantageously provides a liquid-tight package for good protection during sale and eating that includes a lid (See EPO and Derwent abstracts). Damato further teaches advertising on the sleeve (Figure 3). Therefore, it would have been obvious to modify '222 and include a lid as recited in claim 32, since Damato teaches clear sleeve provides benefit of a liquid-tight package for good protection during sale and eating when combined with a lid. It would have been further obvious to provide printed material on the sleeve, as recited in claim 33, depending on the intended use of the package of '222 (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice confection filled cone includes printed material to identify the package. This is a provisional obviousness-type double patenting rejection.

32. Claims 1-10,25-31 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,7-14 of copending Application No. 10/984,914 in view of Kuehl et al. (US EP 0848910 A2).

33. Regarding claims 1-10,25-31, Application '914 differs from the present application only in that '914 does not claim the pattern of lines, different colors, or two different layers of the cone chocolate comprising shell (i.e. chocolate chips present) comprise a first layer of strings that are pressed or flattened and a second confection layer of a contrasting color as recited in claims 1 and 2, that the shell has shiny in appearance as recited in claim 3, and that the pattern is maintained after removal of the package as recited in claim 4.

Art Unit: 1761

34. Kuehl et al. also teach shells intended for holding ice cream, and Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g. white and plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the method followed is the same as Applicant's method. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify '914 and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain chocolate is applied that is shiny as recited in claims 1-3, that maintains good definition as recited in claim 4, since Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color), as recited in claims 1 and 2, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3. This is a provisional obviousness-type double patenting rejection.

Art Unit: 1761

35. Claims 32 and 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,7-14 of copending Application No. 10/984,914 in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-10,25-31 above, further in view of Damato (EP 276333).

36. '914 does not claim the cone shaped sleeve includes a lid as recited in claim 32 or printed material or other adornments on the sleeve or lid as recited in claim 33.

Damato teaches a transparent plastic foil sleeve from an ice confection filled cone that advantageously provides a liquid-tight package for good protection during sale and eating that includes a lid(See EPO and Derwent abstracts) Damato further teaches advertising on the sleeve (Figure 3). Therefore, it would have been obvious to modify '914 and include a lid as recited in claim 32, since Damato teaches clear sleeve provides benefit of a liquid-tight package for good protection during sale and eating when combined with a lid. It would have been further obvious to provide printed material on the sleeve, as recited in claim 33, depending on the intended use of the package of '914 (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice confection filled cone includes printed material to identify the package. This is a provisional obviousness-type double patenting rejection.

Conclusion

37. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure:

Art Unit: 1761

38. Pederson (US 1569568), Baier (US 1778479), Chadwick (US 1436754), Collinson (US 2056122), Krein (US 2106893) and Nolte (US 1947872) teach wrapped chocolate cones holding ice cream.

39. Nolte (US 2001919) teach wrapped and decorated chocolate cones holding ice cream.

40. Kennedy (US 2200956) teaches forming decorative chocolate ice cream cones.


41. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 8:00AM-4:30PM M-F.

42. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

43. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen 
Examiner
Art Unit 1761

RAM


MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700